TENGKU DATO' KAMAL IBNI SIR SULTAN ABU BAKAR & ORS v. BURSA MALAYSIA SECURITIES BHD

FEDERAL COURT, PUTRAJAYA
VERNON ONG LAM KIAT FCJ
ZALEHA YUSOF FCJ
ZABARIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO. 02(F)-122-10-2017(W)]
1 APRIL 2022

Abstract – *The Federal Court may decline to answer any question posed to it that does not relate to a matter in respect of which a determination had been made by the High Court and or the Court of Appeal. The appellants here, in resisting in the Federal Court the committal orders made against them pursuant to s. 360 of the Capital Markets and Services Act 2007 by the High Court and the Court of Appeal, cannot thus raise the issue that the committal orders arose from a monetary judgment not befitting of committal proceedings, as nowhere was this issue raised or canvassed before the Judge who heard the committal proceedings or the Court of Appeal. Since the judges of the two courts had not addressed their minds to this issue, it would be presumptuous for the apex court to guess what they would have decided.*

CIVIL PROCEDURE: *Contempt of court – Committal proceedings – Failure to comply with court order – Court made order under s. 360 of Capital Markets and Services Act 2007 to restore to company monies wrongfully paid out – Whether order of court could be collaterally attacked in separate proceeding without it being set aside – Whether all avenues exhausted to challenge validity of order – Whether order valid and binding – Whether there were merits in contention of resisting order for committal*

CIVIL PROCEDURE: *Appeal – Leave to appeal – Questions of law – Whether questions posed must be couched to incorporate points of law which has effect of reversing conclusions made by lower court – Whether lower court made determination on issues – Whether issues raised in questions of law arose from judgments of lower courts – Whether court could decline to answer questions of law although leave was granted*

The first, second and fourth appellants ('defendants') (referred to as D1, D2 and D4 respectively) were the former directors of Cepatwawasan Group Berhad ('Cepatwawasan'). The respondent ('plaintiff') was Bursa Malaysia Berhad, a stock exchange licensed under the Capital Markets and Services Act 2007 ('CMSA'). The defendants had caused Prolific Yield Sdn Bhd, a wholly-owned subsidiary of Cepatwawasan, to make payments of RM16 million to a company, Opti Temasek Sdn Bhd, and one individual, Sheikh

A Abdul Rahim. Such payments were found to be in violation of s. 16.11(a) of the Listing Requirements of the plaintiff. As a result, the plaintiff issued a show cause letter to the defendants. Subsequently, the plaintiff's Listing Committee ('LC') made a finding that the defendants had breached the Listing Requirements ('LR') and imposed penalties against the defendants
B under s. 360(1)(c)(i), (A) and (K) of the CMSA. The defendants appealed to the appeal committee of the plaintiff against the decision of the LC, raising, *inter alia,* allegations of *sub judice* due to a pending suit in Kuala Lumpur Civil Suit ('Suit 1168'). The appeal committee dismissed the defendants' appeal. The defendants filed a judicial review application, challenging the decision
C of the appeal committee which was dismissed by the High Court and the Court of Appeal. There was no application for leave to appeal filed in the Federal Court. The plaintiff filed an originating summons ('OS 168') at the High Court to enforce the penalties imposed by the LC, which was allowed. The order in the OS 168 were (i) that D1 and D2 jointly and severally, restore to Cepatwawasan the RM13 million paid to Opti Temasek Sdn Bhd;
D and (ii) that the defendants, jointly and severally, restore to Cepatwawasan the RM3 million paid to Sheikh Abdul Rahim ('s. 360 CMSA order'). The defendants appealed to the Court of Appeal against the decision of the High Court on the s. 360 CMSA order. The Court of Appeal, however, upheld the s. 360 CMSA order. The defendants' leave to appeal to the Federal Court
E was dismissed. The defendants failed to comply with the s. 360 CMSA order and as a result, the plaintiff filed a notice of application for an order of committal against the defendants pursuant to O. 52 r. 4 of the Rules of Court 2012 ('ROC'). The defendants contended that the committal proceeding was improper as there were orders that were made earlier and unknown to the
F said defendants affecting the case itself upon which the orders of the High Court and Court of Appeal were made. The defendants argued that the High Court Judge had erred in law and in fact when he failed to consider the Suit 1168 and OS 168 where both sought for similar reliefs. According to the defendants, the plaintiff had no jurisdiction to take action in the first place
G that had resulted in the two courts' orders and that the action of the plaintiff was *sub judice* and prejudicial to the said defendants as there was a civil suit filed by Cepatwawasan (Suit 168) which the defendants alleged that the plaintiff was well aware of. The High Court, however, found that there were no merits in the contention of the defendants resisting the order for committal
H because, *inter alia*, (i) it was clear the arguments of the defendants sought to question the substantive suit itself that had resulted in the s. 360 CMSA order; (ii) it was too late in the day now for the said defendants to challenge the main suit; and (iii) in the committal proceedings, the court was only concerned whether the said defendants had obeyed the s. 360 CMSA order arising from the main suit itself and these orders were final in nature
I requiring the said defendants to follow and comply with the same. The High

Court thus sentenced and fined the defendants respectively, taking into account the huge sums imposed to be paid by the said defendants in the earlier orders of the High Court and Court of Appeal. The High Court opined that the sentence imposed and meted out against the defendants was fair, reasonable and commensurate with the non-compliance of the two courts' orders. The Court of Appeal agreed with the findings of the High Court and further imposed an imprisonment term in the event the contempt was not purged within the stipulated time. Aggrieved by the decision of the Court of Appeal, the defendants filed an application for leave to the Federal Court, which was granted, based on the following questions of law (i) where there was non-compliance of an order for the refund of monies which was a money judgment and not a judgment requiring the performance of an act, whether a court could find that there was contempt for the said non-compliance; (ii) where proceedings were commenced for orders under s. 360 of the CMSA against a bankrupt, whether the plaintiff was obliged to obtain leave pursuant to s. 8(1) of the Bankruptcy Act 1967 ('BA'); and (iii) where committal proceedings were commenced to enforce an order made under s. 360 CMSA against a bankrupt, whether the applicant was obliged to obtain leave pursuant to s. 8(1) of the BA.

Held (dismissing appeal)
Per Zabariah Mohd Yusof FCJ delivering the judgment of the court:

(1) The issue herein was whether the defendants had refused to comply with the s. 360 CMSA order. Section 360 of the CMSA allowed the plaintiff to seek appropriate orders from the court so that persons in breach of the listing requirements could be compelled by the courts to remedy the breach. This, the plaintiff did through the s. 360 CMSA order. Looking at the terms of the s. 360 CMSA order, the terms do not require the defendants to pay the plaintiff. Instead, it compelled the defendants, (who having breached the LR), to restore to Cepatwawasan monies which were wrongly paid out to one Opti Temasek Sdn Bhd and one Sheikh Abdul Rahim. This was not a typical debt between the plaintiff and the defendants *per se*, where the court directed the defendants to make payments to the plaintiff. (paras 33, 37 & 38)

(2) The defendants failed to comply with the s. 360 CMSA order, both at the High Court and affirmed by the Court of Appeal. The defendants had not given any reasonable explanation as to why they could not comply with the s. 360 CMSA order at the hearing of the committal proceedings. The order did not require the defendants to make payments to the plaintiff within a stipulated time or otherwise but rather to restore to Cepatwawasan monies which were wrongfully paid out by D1 and D2, as directors of the defendant company, within a stipulated time period. The plaintiff was not in a debtor and creditor relationship with the defendants. The plaintiff was not a beneficiary to the payment to be

made by the defendants. Question 1 did not relate to a matter in respect of which a determination was made by the Court of Appeal. Questions posed before this court must be couched to incorporate a point of law which, if answered in the affirmative or negative, has the effect of reversing the conclusions made by the Court of Appeal without any evaluation of the evidence. As the Court of Appeal did not make any determination on this issue, answering the question would not have any effect on the appeal of the defendants. Therefore, this court declined to answer Question 1. (paras 39-47)

(3) The power to order restitution by the plaintiff is provided for under s. 360(1)(c)(ii) (M) of the CMSA. Hence, there was no issue that the court has the authority and jurisdiction to make the s. 360 CMSA order. In any event, it was superfluous to raise the issue whether the plaintiff has the jurisdiction to direct the defendants to restore the monies to Cepatwawasan as the court had issued the s. 360 CMSA order. In addition, this court was not the proper forum to address this issue as the proper forum to raise the same was at the judicial review proceedings. It had, in fact, been raised there and it was rejected. Be that as it may, the plaintiff had relied on para. 16.17(1)(b) of the LR when it directed the defendants to make restitution to Cepatwawasan, which had been paid out in breach of the LR. Hence, to attack the s. 360 CMSA order by raising it in this present appeal, which was an appeal against the committal order, was a collateral attack which the Federal Court refused to grant leave to the defendants to pursue this question of whether they could collaterally attack the s. 360 CMSA order. It is trite law that an order of the court could not be collaterally attacked in a separate proceeding without it being set aside. (paras 56-59)

(4) At the time when the filing of the proceedings to obtain the s. 360 order was instituted by the plaintiff, D1 was already a bankrupt. However, at that point in time, D1 failed to disclose the fact that he was a bankrupt and therefore did not seek the necessary sanction and approval to appoint solicitors to represent him in those proceedings. The appeal herein was on the determination by the courts below on the orders of committal against the defendants. It was never to consider whether the s. 360 CMSA order was valid or not. Hence, it was not for this court to consider the validity of the s. 360 CMSA order at this stage, when this issue was never addressed at all in the court below. The validity of the s. 360 CMSA order was affirmed by the Court of Appeal and leave to appeal to the Federal Court was dismissed. It was not for this court to reverse the decision of the courts below premised on the question posed when the issue raised in the question was never addressed, argued nor canvassed by the parties before the courts below which had not made any determination on the issue in question. Essentially, the

manner in which Question 2 was framed also amounted to a collateral attack on the s. 360 CMSA order, which the law does not permit, given that D1 attempted and failed to challenge the s. 360 CMSA order in the High Court and the Court of Appeal. He had exhausted all avenues of appeal right up to the Federal Court to challenge the validity of the s. 360 CMSA order but failed. Hence, the s. 360 CMSA order, for all intents and purposes, was valid and binding. This court declined to answer Question 2. (paras 62-66)

(5) Section 8(1) of the BA applies to a creditor. The plaintiff was not a creditor where the defendant owed a debt, whether provable in bankruptcy or otherwise. The s. 360 CMSA order does not create a creditor-debtor relationship. The s. 360 CMSA order directs the defendants to restore monies to Cepatwawasan upon which the committal proceedings were premised. It did not create a debt between the plaintiff and the defendant. Hence, the issue to be determined was whether the monies mentioned in the s. 360 CMSA order was a 'debt provable in bankruptcy' within the meaning of s. 40 of the BA. The monies, as referred to in the s. 360 CMSA order, were not debts nor liabilities as envisaged under s. 40 of the BA. Hence, s. 8(1) had no application whatsoever to the present case as there was no debt owing by the defendant to the plaintiff. The prohibition in s. 8(1) of the BA applies to a creditor which the plaintiff was not, nor was s. 360 CMSA order a 'debt provable in bankruptcy.' This court declined to answer Question 3 as it did not relate to the matter in respect of which a determination had been made by the High Court and the Court of Appeal. (paras 68-75)

(6) The issues raised in the three questions did not arise from the judgments of the High Court or the Court of Appeal in the committal proceedings. Answering the questions would not have determinative effect on the appeal before this court. This court declined to answer the three questions posed, despite leave had been granted. (paras 76-81)

Bahasa Melayu *Headnotes*

Perayu pertama, kedua dan keempat ('defendan-defendan') (masing-masing disebut sebagai D1, D2 dan D4) adalah mantan pengarah-pengarah Cepatwawasan Group Berhad ('Cepatwawasan'). Responden ('plaintif') adalah Bursa Malaysia Berhad, bursa saham yang dilesenkan bawah Akta Pasaran Modal dan Perkhidmatan 2007 ('CMSA'). Defendan-defendan telah menyebabkan Prolific Yield Sdn Bhd, anak syarikat milik penuh Cepatwawasan, membuat bayaran berjumlah RM16 juta kepada sebuah syarikat, Opti Temasek Sdn Bhd, dan seorang individu, Sheikh Abdul Rahim. Pembayaran sedemikian didapati melanggar s. 16.11(a) Syarat-Syarat Penyenaraian plaintif. Akibatnya, plaintif mengeluarkan surat tunjuk sebab kepada defendan. Jawatankuasa Penyenaraian plaintif ('LC') membuat

keputusan bahawa defendan telah melanggar Syarat-Syarat Penyenaraian ('LR') dan menjatuhkan hukuman terhadap defendan bawah s. 360(1)(c)(i), (A) dan (K) CMSA. Defendan mengemukakan rayuan kepada Jawatankuasa Rayuan plaintif terhadap keputusan LC, yang membangkitkan, antara lain, tuduhan *sub judice* kerana guaman yang belum selesai dalam Guaman Sivil Kuala Lumpur ('Guaman 1168'). Jawatankuasa Rayuan menolak rayuan defendan. Defendan mengemukakan permohonan semakan kehakiman, mencabar keputusan Jawatankuasa Rayuan yang ditolak oleh Mahkamah Tinggi dan Mahkamah Rayuan. Tidak ada permohonan kebenaran untuk rayuan difailkan di Mahkamah Persekutuan. Plaintif mengemukakan saman pemula ('OS 168') di Mahkamah Tinggi untuk menguatkuasakan hukuman yang dikenakan oleh LC, yang dibenarkan. Perintah OS 168 adalah (i) bahawa D1 dan D2 bersama-sama dan berasingan, mengembalikan kepada Cepatwawasan RM13 juta yang dibayar kepada Opti Temasek Sdn Bhd; dan (ii) bahawa defendan, bersama-sama dan secara berasingan, mengembalikan kepada Cepatwawasan RM3 juta yang dibayar kepada Sheikh Abdul Rahim ('perintah s. 360 CMSA'). Defendan mengemukakan rayuan ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi atas perintah CMSA s. 360. Mahkamah Rayuan, walau bagaimanapun, mengesahkan perintah s. 360 CMSA. Kebenaran defendan untuk membuat rayuan ke Mahkamah Persekutuan ditolak. Defendan gagal mematuhi perintah s. 360 CMSA dan akibatnya, plaintif mengemukakan notis permohonan perintah pengkomitan terhadap defendan menurut A. 52 k. 4 Kaedah-kaedah Mahkamah 2012 ('ROC'). Defendan menghujahkan bahawa prosiding pengkomitan tidak teratur kerana terdapat perintah yang dibuat lebih awal dan tidak diketahui oleh defendan-defendan tersebut yang mempengaruhi kes itu sendiri di mana perintah Mahkamah Tinggi dan Mahkamah Rayuan dibuat. Defendan berpendapat bahawa Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila beliau gagal mempertimbangkan Guaman 1168 dan OS 168 di mana kedua-duanya menuntut relief-relief yang sama. Menurut defendan-defendan, plaintif tidak mempunyai bidang kuasa untuk mengambil tindakan yang telah menyebabkan perintah kedua-dua mahkamah dan bahawa tindakan plaintif adalah *sub judice* dan memudaratkan defendan-defendan tersebut kerana terdapat guaman sivil yang difailkan oleh Cepatwawasan (Guaman 168) yang defendan dakwa diketahui plaintif. Mahkamah Tinggi, walau bagaimanapun, mendapati tiada merit dalam pertikaian defendan menentang perintah pengkomitan kerana, antara lain, (i) jelas hujahan defendan cuba mempersoalkan guaman substantif itu sendiri yang telah menyebabkan perintah s. 360 CMSA; (ii) sudah terlalu lewat untuk defendan-defendan tersebut mencabar guaman utama; dan (iii) dalam prosiding pengkomitan, mahkamah hanya perlu menangani sama ada defendan tersebut telah mematuhi perintah s. 360 CMSA yang timbul daripada guaman utama itu sendiri dan perintah ini adalah muktamad yang memerlukan defendan mengikuti dan mematuhi perintah yang sama. Mahkamah Tinggi masing-masing menjatuhkan hukuman dan denda terhadap

defendan-defendan, dengan mengambil kira jumlah besar yang dikenakan untuk dibayar oleh defendan-defendan tersebut dalam perintah Mahkamah Tinggi dan Mahkamah Rayuan sebelumnya. Mahkamah Tinggi berpendapat bahawa hukuman yang dijatuhkan terhadap defendan-defendan adalah adil, munasabah dan sepadan dengan ketidakpatuhan perintah kedua-dua mahkamah. Mahkamah Rayuan bersetuju dengan dapatan Mahkamah Tinggi dan selanjutnya menjatuhkan hukuman penjara sekiranya penghinaan itu tidak diselesaikan dalam waktu yang ditentukan. Terkilan dengan keputusan Mahkamah Rayuan, defendan-defendan memfailkan permohonan kebenaran ke Mahkamah Persekutuan, yang diberikan, berdasarkan persoalan undang-undang berikut (i) apabila terdapat ketidakpatuhan perintah untuk pengembalian wang yang merupakan wang penghakiman dan bukan keputusan yang memerlukan pelaksanaan suatu tindakan, sama ada mahkamah boleh mendapati bahawa terdapat penghinaan terhadap ketidakpatuhan tersebut; (ii) apabila prosiding dimulakan untuk perintah bawah s. 360 CMSA terhadap seorang yang bankrap, sama ada plaintif wajib mendapatkan kebenaran menurut s. 8(1) Akta Kebankrapan 1967 ('BA'); dan (iii) apabila prosiding pengkomitan dimulakan untuk menguatkuasakan perintah yang dibuat bawah s. 360 CMSA terhadap seorang bankrap, sama ada pemohon wajib mendapatkan kebenaran menurut s. 8(1) BA.

Diputuskan (menolak rayuan)

Oleh Zabariah Mohd Yusof HMP menyampaikan penghakiman mahkamah:

(1) Isu di sini adalah sama ada defendan enggan mematuhi peraturan perintah s. 360 CMSA. Seksyen 360 CMSA membenarkan plaintif untuk menuntut perintah yang sewajarnya dari mahkamah supaya pihak yang melanggar LR boleh diarah oleh mahkamah untuk membetulkan pelanggaran. Ini dilakukan oleh plaintif melalui perintah s. 360 CMSA. Melihat syarat-syarat perintah s. 360 CMSA, syarat-syarat tersebut tidak memerlukan defendan membayar plaintif. Sebaliknya ia memaksa defendan-defendan, (yang telah melanggar LR), untuk mengembalikan kepada Cepatwawasan wang yang telah salah dibayarkan kepada satu Opti Temasek Sdn Bhd dan seorang Sheikh Abdul Rahim. Ini bukan hutang biasa antara plaintif dan defendan sendiri, di mana mahkamah mengarahkan defendan untuk membuat pembayaran kepada plaintif.

(2) Defendan gagal mematuhi perintah s. 360 CMSA, didapati oleh Mahkamah Tinggi dan disahkan oleh Mahkamah Rayuan. Defendan tidak memberikan penjelasan yang munasabah mengapa mereka tidak dapat mematuhi perintah s. 360 CMSA di pendengaran prosiding pengkomitan. Perintah itu tidak menghendaki defendan-defendan membuat pembayaran kepada plaintif dalam waktu yang ditentukan atau sebaliknya, melainkan untuk mengembalikan wang Cepatwawasan yang salah dibayar oleh D1 dan D2, sebagai pengarah-pengarah syarikat

defendan, dalam jangka waktu yang ditentukan. Plaintif tidak mempunyai hubungan penghutang dan pemiutang dengan defendan. Plaintif bukan penerima pembayaran yang akan dibuat oleh defendan-defendan. Soalan 1 tidak berkaitan dengan masalah yang mana penentuan dibuat oleh Mahkamah Rayuan. Persoalan yang diajukan di mahkamah ini harus dibentukkan agar memasukkan hujahan undang-undang yang, jika dijawab secara afirmatif atau negatif, mempunyai kesan mengakas kesimpulan yang dibuat oleh Mahkamah Rayuan tanpa penilaian bukti. Oleh kerana Mahkamah Rayuan tidak membuat penentuan mengenai masalah ini, menjawab persoalan itu tidak akan mempengaruhi rayuan defendan-defendan. Oleh itu, mahkamah ini enggan menjawab Soalan 1.

(3) Kuasa untuk memerintahkan pengembalian oleh plaintif diperuntukkan bawah s. 360(1)(c)(ii)(M) CMSA. Oleh itu, tidak timbul isu bahawa mahkamah memiliki kuasa dan bidang kuasa untuk membuat perintah s. 360 CMSA. Walau bagaimanapun, adalah berlebihan untuk membangkitkan isu sama ada plaintif memiliki bidang kuasa untuk mengarahkan defendan-defendan mengembalikan wang tersebut ke Cepatwawasan sebagaimana Mahkamah telah mengeluarkan perintah s. 360 CMSA. Di samping itu, mahkamah ini bukanlah forum yang sesuai untuk menangani masalah ini kerana forum yang tepat untuk mengemukakan hal yang sama adalah dalam proses semakan kehakiman. Sebenarnya isu ini telah dibangkitkan semasa proses semakan kehakiman tetapi ditolak. Walau bagaimanapun, plaintif telah bergantung pada per. 16.17(1)(b) LR ketika mengarahkan defendan-defendan untuk membuat pengembalian ke Cepatwawasan, yang telah dibayar melanggar LR. Oleh itu, untuk menyerang perintah s. 360 CMSA dengan mengemukakannya dalam rayuan ini, yang merupakan rayuan terhadap perintah pengkomitan, adalah serangan cagaran yang ditolak Mahkamah Persekutuan untuk memberikan kebenaran kepada defendan untuk mengemukakan persoalan ini sama ada mereka boleh menyerang perintah s. 360 CMSA secara kolektif. Adalah undang-undang matan bahawa perintah mahkamah tidak dapat diserang secara kolektif dalam proses yang terpisah tanpa diketepikan.

(4) Pada masa pemfailan prosiding untuk memperoleh perintah s. 360 dimulakan oleh plaintif, D1 sudah bankrap. Namun, pada masa itu, D1 gagal mengungkapkan fakta bahawa dia bankrap dan oleh itu tidak meminta sanksi dan persetujuan yang diperlukan untuk melantik peguam untuk mewakilinya dalam prosiding tersebut. Rayuan di sini adalah atas penentuan oleh mahkamah bawahan atas perintah pengkomitan terhadap defendan. Bukan untuk mempertimbangkan sama ada perintah s. 360 CMSA itu sah atau tidak. Oleh itu, bukan untuk mahkamah ini mempertimbangkan kesahihan perintah s. 360 CMSA pada peringkat

ini, ketika isu ini tidak pernah ditangani sama sekali di mahkamah bawahan. Kesahihan perintah s. 360 CMSA disahkan oleh Mahkamah Rayuan dan kebenaran untuk mengemukakan rayuan ke Mahkamah Persekutuan ditolak. Bukan untuk mahkamah ini mengakas keputusan mahkamah bawahan yang berdasarkan pada persoalan yang diajukan ketika isu yang dibangkitkan dalam persoalan itu tidak pernah ditangani, dibahaskan atau diteliti oleh pihak-pihak di hadapan mahkamah bawahan yang tidak membuat penentuan tentang isu tersebut. Pada dasarnya, cara Soalan 2 dirangka juga adalah satu serangan cagaran terhadap perintah s. 360 CMSA, yang tidak dibenarkan oleh undang-undang, memandangkan D1 berusaha dan gagal mencabar perintah s. 360 CMSA di Mahkamah Tinggi dan Mahkamah Rayuan. Dia telah menghabiskan semua jalan rayuan hingga ke Mahkamah Persekutuan untuk mencabar kesahihan perintah s. 360 CMSA tetapi gagal. Oleh itu, perintah s. 360 CMSA, untuk semua maksud dan tujuan, adalah sah dan mengikat. Mahkamah ini enggan menjawab Soalan 2.

(5) Seksyen 8(1) BA terpakai pada pemiutang. Plaintif bukan pemiutang yang defendan hutangi, sama ada boleh dibuktikan dalam kebankrapan atau sebaliknya. Perintah s. 360 CMSA tidak mewujudkan hubungan pemiutang-penghutang. Perintah s. 360 CMSA mengarahkan defendan-defendan untuk mengembalikan wang kepada Cepatwawasan di mana prosiding pengkomitan dibuat. Itu tidak menimbulkan hutang antara plaintif dan defendan. Oleh itu, isu yang harus ditentukan adalah sama ada wang dalam perintah s. 360 CMSA adalah 'hutang yang dapat dibuktikan dalam kebankrapan' dalam erti s. 40 BA. Wang, sebagaimana dimaksudkan dalam perintah s. 360 CMSA, bukan hutang atau liabiliti sebagaimana dimaksudkan dalam s. 40 BA. Oleh itu, s. 8(1) tidak diguna pakai langsung untuk kes ini kerana tidak ada hutang yang terhutang oleh defendan kepada plaintif. Larangan dalam s. 8(1) BA terpakai untuk pemiutang yang bukan plaintif, dan juga perintah s. 360 CMSA memerintahkan 'hutang yang dapat dibuktikan dalam kebankrapan.' Mahkamah ini menolak untuk menjawab Soalan 3 kerana tidak berkaitan dengan perkara tentang penentuan yang telah dibuat oleh Mahkamah Tinggi dan Mahkamah Rayuan.

(6) Isu-isu yang dibangkitkan dalam tiga persoalan itu tidak timbul dari keputusan Mahkamah Tinggi atau Mahkamah Rayuan dalam proses pengkomitan. Menjawab soalan-soalan ini tidak akan memberi kesan penentu pada rayuan di hadapan mahkamah ini. Mahkamah ini menolak untuk menjawab tiga persoalan yang diajukan, walaupun kebenaran telah diberikan.

Case(s) referred to:

Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal [2019] 9 CLJ 153 FC ***(refd)***

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2009] 3 CLJ 125 FC ***(refd)***

Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal [2012] 8 CLJ 667 CA ***(refd)***

Hong Leong Bank Bhd v. Phung Tze Thiam [2008] 4 CLJ 742 CA ***(refd)***

Meidi-Ya Co Ltd, Japan & Anor v. Meidi (M) Sdn Bhd [2009] 2 CLJ 15 FC ***(refd)***

Raphael Pura v. Insas Bhd & Ors [2003] 1 CLJ 61 FC ***(refd)***

Spind Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Anor [2018] 4 CLJ 705 FC ***(refd)***

Tan Heng Chew & Ors v. Tan Kim Hor & Ors [2006] 3 CLJ 481 FC ***(refd)***

Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd [2016] 8 CLJ 163 FC ***(refd)***

Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal [2012] 8 CLJ 678 CA ***(refd)***

The Minister For Human Resources v. Thong Chin Yoong & Another Appeal [2001] 3 CLJ 933 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 2, 8(1), 24, 40

Capital Markets and Services Act 2007, s. 360(1)(c)(i), (A), (K)

Rules of Court 2012, O. 45 rr. 1, 5(1), O. 52 r. 4

Rules of the Federal Court 1995, r. 47

For the appellants - Malik Imtiaz Sarwar, Jasbeer Singh Kaura & Wong Ming Yen; M/s Jasbeer Nur & Lee

For the respondent - Preetha Pillai, Nimalan Devaraja & Muhammad Suhaib Mohamed Ibrahim; M/s Skrine

[Editor's note: For the Court of Appeal judgment, please see Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar & Ors v. Bursa Malaysia Securities Bhd [2020] 5 CLJ 751 (affirmed);

High Court judgment, Bursa Malaysia Securities Bhd v. Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors [2017] 1 CLJ 81 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof FCJ:

[1] This is the unanimous decision of this court. On 16 October 2017, this court allowed the application for leave to appeal to the appellants/ defendants, based on the following questions of law:

(i) Where there is non-compliance of an order for the refund of monies which is a money judgment and not a judgment requiring the performance of an act, whether a court can find that there is contempt for the said non-compliance?;

(ii) where proceedings are commenced for orders under s. 360 of the Capital Markets and Services Act 2007 ("CMSA") against a bankrupt, whether the plaintiff is obliged to obtain leave pursuant to s. 8(1) of the Bankruptcy Act 1967 (BA); and

(iii) where committal proceedings are commenced to enforce an order made under s. 360 of the CMSA, against a bankrupt whether the applicant is obliged to obtain leave pursuant to s. 8(1) of the Bankruptcy Act 1967.

Background

[2] In this judgment, we will refer to the parties, as they appear in the High Court, namely, the appellants as the defendants and the respondent as the plaintiff.

[3] The first, second and fourth defendants (referred to as D1, D2 and D4 respectively) were the former directors of Cepatwawasan Group Berhad ("Cepatwawasan"), a company listed on the Main Board of Bursa Malaysia Berhad.

[4] The plaintiff is Bursa Malaysia Berhad which is a stock exchange licensed under the Capital Markets and Services Act 2007 (CMSA).

[5] The defendants had caused Prolific Yield Sdn Bhd, a wholly-owned subsidiary of Cepatwawasan to make payments of RM16 million to a company called Opti Temasek Sdn Bhd and one individual by the name of Sheikh Abdul Rahim. Such payments were found to be in violation of section 16.11(a) of the Listing Requirements of the plaintiff. As a result, on 12 July 2005 the plaintiff issued a show cause to the defendants. Subsequently, on 13 October 2005 the plaintiff's Listing Committee made a finding that the defendants had breached the Listing Requirements and imposed penalties against the defendants under s. 360(1)(c)(i), (A) and (K) of the CMSA.

[6] The defendants appealed to the Appeal Committee of the plaintiff against the decision of the Listing Committee, raising, *inter alia*, allegations of *sub-judice* due to a pending suit in Kuala Lumpur Civil Suit No. D3-22-1168-2004 (Suit 1168). Suit 1168 is elaborated in para. 21 of this judgment.

[7] On 12 June 2006, the Appeal Committee dismissed the defendants' appeal.

[8] On 14 June 2006, the defendants filed a judicial review application at the Kuala Lumpur High Court *vide* Judicial Review Application No. R1-25-2006 challenging the decision of the Appeal Committee.

[9] On 18 January 2010, the Kuala Lumpur High Court dismissed the judicial review application with costs. The defendants appealed to the Court of Appeal against the said decision.

[10] On 19 March 2013, the Court of Appeal dismissed the appeal. There was no application for leave to appeal filed in the Federal Court.

Section 360 CMSA Order

[11] On 26 May 2010, the plaintiff filed an Originating Summons No. D-24NCC-168-2010 (OS 168) at the Kuala Lumpur High Court to enforce the penalties imposed by the Listing Committee on 13 October 2005 (which was later affirmed by the Appeal Committee). On 28 December 2010, the High Court allowed the OS 168 with costs. The order in the OS 168 are as follows:

(i) that within 30 days of the High Court Order, D1 and D2 jointly and severally, restore to Cepatwawasan the RM13 million paid to Opti Temasek Sdn Bhd; and

(ii) that within 30 days of the High Court Order, the defendants, jointly and severally, restore to Cepatwawasan the RM3 million paid to Sheikh Abdul Rahim.

(Hereinafter referred to as "s. 360 CMSA order").

[12] The defendants (including D3) appealed to the Court of Appeal against the decision of the High Court on the s. 360 CMSA order. On 16 December 2012, the Court of Appeal upheld the s. 360 CMSA order ("Court of Appeal order dated 16 December 2012"), save for the variation that all the payments and acts stated in the order shall be carried out within 30 of the date of the Court of Appeal order.

[13] The defendants' leave to appeal to the Federal Court was dismissed with costs on 28 December 2013.

Contempt Proceedings

[14] The defendants failed to comply with the Court of Appeal order dated 16 December 2012 (which is the s. 360 CMSA order). As a result, on 5 December 2014, the plaintiff, after obtaining leave from the High Court, filed a notice of application for an order of committal against the defendants pursuant to O. 52 r. 4 of the Rules of Court 2012 (ROC) in encl. 48.

[15] At the contempt proceedings, the plaintiff submitted that since the defendants failed to comply with both judgments by the High Court and Court of Appeal, the order of committal ought to be granted against them.

[16] There is no dispute the said defendants are fully aware of these two courts' orders and there is no dispute that the defendants were served with the relevant cause papers for the committal proceeding.

[17] The defendants contended that the committal proceeding is improper as there were orders that were made earlier and unknown to the said defendants affecting the case itself upon which the orders of the High Court and Court of Appeal were made.

[18] There is a consent judgment which was recorded by the relevant parties including the said defendants that had settled the two orders of the High Court and Court of Appeal (consent judgment). Hence, the contention of the defendants that the committal proceeding was wrongly undertaken by the plaintiff without full disclosure to this court regarding the consent judgment already recorded.

[19] The defendants argued that the learned High Court Judge had erred in law and fact when he failed to consider the Suit 1168 and OS 168 where both sought for similar reliefs. The fact that the defendants complied with the terms of the consent judgment made the conviction and the sentencing against the defendants in the committal proceedings as wrongful.

[20] The plaintiff has no jurisdiction to take action in the first place that has resulted in the two courts' orders.

[21] The action of the plaintiff is *sub-judice* and prejudicial to the said defendants as there was a civil suit filed by Cepatwawasan (Suit 168) which the defendants alleged that the plaintiff was well aware of Suit 168 was a suit against 18 defendants, which included the defendants herein which, *inter alia* sought for;

(i) the sum of RM16 million from D1-D4 and D14-D17;

(ii) the sum of RM3 million from D5-D7 and D9-D13;

(iii) the sum of RM4 million from D8; and

(iv) interest.

High Court's Findings And Decision On The Contempt Proceedings

[22] The court found that there are no merits in the contention of the said defendants resisting the order for committal for the following reasons:

(i) It is clear the arguments of the said defendants as narrated earlier sought to question the substantive suit itself that has resulted in the s. 360 CMSA order;

(ii) It is too late in the day now for the said defendants to challenge the main suit;

(iii) The merits of the defence of the said defendants in the main suit itself should have been raised before the s. 360 CMSA order was issued by the High Court and Court of Appeal respectively;

(iv) With the issuance of the s. 360 CMSA order, it is apparent the said defendants had lost the main suit instituted by the plaintiff against them;

(v) It is not the duty of the court now to consider the merits of the defence of the said defendants in the main suit that had already been decided by the High Court and Court of Appeal earlier. The application for leave to appeal to the Federal Court on the main suit was also dismissed.

(vi) In the committal proceedings, the court is only concerned whether the said defendants had obeyed the s. 360 CMSA order arising from the main suit itself. And these orders are final in nature requiring the said defendants to follow and comply with the same.

[23] The court had sentenced the said defendants as follows:

(i) a fine of RM2 million on D1 to be paid within 90 days from the date of sentencing and in default 30 days' imprisonment;

(ii) a similar fine also on D2 to be paid within 90 days from the date of sentencing and in default 30 days' imprisonment; and

(iii) a fine of RM100,000 on D4 to be paid within 90 days from the date of sentencing and in default 14 days' imprisonment.

[24] The court found that these sentences are appropriate and reasonable having regard to the fact that the said defendants had refused to obey the s. 360 CMSA order.

[25] These sentences also took into account the huge sums imposed to be paid by the said defendants as narrated earlier in the High Court's order and affirmed by the Court of Appeal's order.

[26] The High Court opined that the sentence imposed and meted out against the said defendants is fair, reasonable and commensurate with the non-compliance of the two courts' orders, namely, the orders of the High Court dated 28 December 2010, as affirmed and varied by the Court of Appeal order dated 16 August 2012.

Appeal To The Court Of Appeal On The Contempt Proceedings

[27] Aggrieved with the decision of the High Court, the applicants/ defendants appealed to the Court of Appeal.

[28] On 13 February 2017, the court found that there were no merits in the defendants' appeal and unanimously dismissed the defendants' appeal on the finding of contempt of all the defendants by the High Court.

[29] The Court of Appeal agreed with the findings of the High Court Judge that both the orders of the High Court dated 28 December 2010 ("s. 360 CMSA order"), as affirmed and varied by the Court of Appeal order dated 16 August 2012, have not been complied with, by the defendants. The Court

of Appeal affirmed that part of the High Court order dated 1 July 2016 (*ie*, the decision of the High Court on sentencing pursuant to the committal order and the imposition of fine).

[30] In respect of the defendants' appeal against sentence and the plaintiff's cross-appeal on the same, Court of Appeal found there were merits in the cross-appeal based on its findings as the court had referred to earlier, and unanimously allowed the cross-appeal and imposed an imprisonment term in the event the contempt was not purged within 30 days. The appeal by the defendants on sentence was dismissed.

[31] The Court of Appeal set aside that part of the High Court order dated 1 July 2016 and substituted it with the following orders:

(i) the defendants/appellants shall comply with the orders of the High Court dated 28 December 2010, as affirmed and varied by the Court of Appeal order dated 16 August 2012, within three months from 13 February 2017; and

(ii) in default of the above, the court imposed the sentence of imprisonment on the respective defendants/appellants as follows:

(a) for D1 (Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar), five years imprisonment from the expiry of the three-month period;

(b) for D2 (Lt. Kol. Tengku Dato' Kamarul Zaman Ibni Al Marhum Sultan Sir Abu Bakar), five years imprisonment from the expiry of the three-month period;

(c) for D4 (Abdul Rahim bin Sendiri), one-year imprisonment from the expiry of the three-month period, or upon the said defendants/appellants purging their contempt in accordance with the terms of the order of the High Court dated 28 December 2010, as affirmed and varied by the order of the Court of Appeal dated 16 August 2012, whichever is earlier.

Proceedings In The Federal Court

[32] Aggrieved by the decision of the COA, the defendants filed an application for leave to the Federal Court, which was granted on 16 October 2017. The defendants' grounds of appeal premised on the memorandum of appeal are as follows:

(i) The learned judges of the Court of Appeal erred in law and/or in fact in dismissing the defendants' appeal and allowing the plaintiff's cross-appeal;

(ii) The learned judges of the Court of Appeal erred in law in having affirmed the finding of the High Court that D1 and the D3 were in contempt given the following matters:

(a) D1 was made a bankrupt on 13 September 2006 at which point the High Court made an adjudication and receiving order pursuant to s. 24 of the BA.

(b) The proceedings that culminated in the judgment dated 28 December 2010 in Kuala Lumpur High Court (OS 168) as varied by the Court of Appeal by way of orders dated 16 August 2012, which were the subject of the contempt proceedings herein were commenced on 5 November 2014. Additionally, the rulings of the plaintiff sought to be enforced by the plaintiff by way of OS 168 were made in proceedings that commenced on or about 26 May 2010.

(c) The plaintiff was required by law to obtain the leave of the High Court pursuant to s. 8(1) of the BA before commencing OS 168.

(d) As this was not done, the enforcement order *vide* OS 168 was made in excess of jurisdiction and therefore void.

(iii) The learned judges of the Court of Appeal erred in law in having affirmed the findings of the High Court that D1 and D3 were in contempt given the following matters:

(a) D3 was made bankrupt on 17 July 2014 at which point the High Court made an adjudication and receiving order pursuant to s. 24 of the BA.

(b) Similarly, the plaintiff was required by law to obtain the leave of the High Court pursuant to s. 8(1) of the BA before commencing the contempt proceedings against D1 and D3.

(c) The contempt proceedings were similarly commenced without leave of court pursuant to s. 8(1) of the BA. The order of contempt granted by the High Court was in excess of jurisdiction and therefore void.

(d) The fact that the official assignee had stated that the plaintiff did not require sanction to proceed against D1 and D3 for the committal proceedings was immaterial.

(iv) The learned judges of the Court of Appeal erred in law and/or fact in failing to appreciate that the subject of the contempt proceedings, that is the enforcement order pursuant to OS 168, was in law, a money judgment which was not enforceable by way of contempt proceedings under O. 45 r. 1, Rules of Court 2012;

(v) The learned judges of the Court of Appeal further erred in law and/or fact in concluding that the plaintiff had proven its case against the defendants for the order of committal and enhancing the sentence against the defendants; and

(vi) In this regard, the High Court had disallowed the defendants from collaterally attacking the enforcement order pursuant to OS 168 in that the High Court did not allow the defendants to go behind the same. In so concluding, the defendants were precluded from relying on the following matters which would have had a material bearing on the contempt proceedings:

(a) Cepatwawasan had already entered into a consent judgment dated 29 October 2010, with various parties including the defendants and that Cepatwawasan accepted payment from the D1 as full and final settlement. Therefore, the subject matter of the OS 168 and the enforcement order pursuant to OS 168 were compromised.

(b) This was material given that the High Court was concerned with the enforcement of rulings made by the plaintiff pursuant to powers vested in it under the listing requirements of Bursa Malaysia Securities Berhad. These powers did not include the power to direct repayment of monies in the manner done by the plaintiff in the case at hand. Notwithstanding, the fact that the enforcement order pursuant to OS 168 was affirmed by the Court of Appeal, it was still open to the defendants to challenge the validity of the same.

(c) These were grounds available to the defendants to oppose the contempt proceedings and, where D1 and D3 were concerned, to oppose an application for leave under s. 8(1) of the BA.

(d) Further, the plaintiff was seeking to enforce a money judgment under which, in so far as the order for repayment of monies to Cepatwawasan was concerned, the plaintiff was not entitled to receipt of the same.

(e) D2 had paid the sum of RM1,020,000 for the fine imposed by the plaintiff.

(f) D1 and D3 had not done so given their bankruptcy.

Our Decision

Question 1

Where There Is Non-compliance Of An Order For The Refund Of Monies Which Is A Money Judgment And Not A Judgment Requiring The Performance Of An Act, Whether A Court Can Find That There Is Contempt For The Said Non-compliance?

[33] We have to remind ourselves that the appeal before us is against the decision of the Court of Appeal which had upheld the decision of the High Court in issuing an order of committal against the defendants pursuant to O. 45 r. 5(1) of the Rules of Court 2012. The issue herein is whether the defendants had refused to comply with the s. 360 CMSA order.

[34] The s. 360 CMSA order reads as follows:

> That within 30 days of the Court of Appeal Order, the 1st and the 2nd appellants, jointly and severally, restore to Cepatwawasan Group Berhad (Cepat Wawasan) the RM13 million paid to Opti Temasek Sdn Bhd; and
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> That within 30 days of the Court of Appeal order, the appellants, jointly and severally, restore to Cepatwawasan the RM3 million paid to Sheikh Abdul Rahim.

[35] Question 1 posed by the defendant raises the issue of whether monetary judgment can be enforced *via* committal proceedings. Hence, the submissions of parties with regard to the divergent views as expressed by the Court of Appeal in *Hong Leong Bank Bhd v. Phung Tze Thiam* [2008] 4 CLJ 742 and *Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal* [2012] 8 CLJ 667; [2013] 2 MLJ 251. However, before we address this issue, it is important to understand the scope of the s. 360 CMSA order, upon which the committal order against the defendants was premised on.

[36] The plaintiff is the frontline regulator of the Malaysian capital market and is tasked with maintaining the integrity of the stock exchange by ensuring compliance with the Listing Requirements and ensuring proper governance. The plaintiff had found that the defendants' conduct in causing Prolific Yield Sdn Bhd to make payments to Opti Temasek Sdn Bhd and Sheikh Abdul Rahim was in breach of the financial assistance provisions in the plaintiff's Listing Requirements. Hence, the s. 360 CMSA order against the defendants.

[37] Section 360 of the CMSA allowed the plaintiff to seek appropriate orders from the court so that persons in breach of the Listing Requirements can be compelled by the courts to remedy the breach. This the plaintiff did through the s. 360 order.

[38] Looking at the terms of the s. 360 CMSA order, the terms do not require the defendants to pay the plaintiff. Instead, it compels the defendants, (who having breached the Listing Requirements), to restore to Cepatwawasan monies which were wrongly paid out to one Opti Temasek Sdn Bhd and one Sheikh Abdul Rahim. This is not a typical debt between the plaintiff and the defendants *per se*, where the court directs the defendants to make payments to the plaintiff.

[39] The defendants failed to comply with the s. 360 CMSA order both at the High Court and affirmed by the Court of Appeal. It is to be noted that the defendants have not given any reasonable explanation as to why they could not comply with the s. 360 CMSA order at the hearing of the committal proceedings.

[40] The order does not require the defendants to make payment to the plaintiff within a stipulated time or otherwise but rather to restore to Cepatwawasan monies which were wrongfully paid out by D1 and D2, as directors of the defendant company, within a stipulated time period.

[41] The plaintiff is not in a debtor and creditor relationship with the defendants. In other words, the plaintiff is not the beneficiary to the payment to be made by the defendants.

[42] Coming back to Question 1 posed by the defendants, the issue as to whether it is a monetary judgment or not befitting a committal proceedings from being instituted against the defendants, has not been raised in the courts below. Nowhere did the defendants raised this issue nor canvass before the judge who heard the committal proceedings and neither was it raised in the Court of Appeal. The judges in the High Court and the Court of Appeal had not addressed their minds to this issue and it would be presumptuous for this court to guess what the High Court and the Court of Appeal would have decided.

[43] In other words, question 1 posed does not relate to a matter in respect of which a determination has been made by the Court of Appeal (See *Meidi-Ya Co Ltd, Japan & Anor v. Meidi (M) Sdn Bhd* [2009] 2 CLJ 15; [2009] 2 MLJ 14).

[44] Question posed before this court must be couched to incorporate a point of law which, if answered in the affirmative or negative has the effect of reversing the conclusions made by the Court of Appeal without any evaluation of the evidence. As the Court of Appeal did not make any determination on this issue, answering the question would not have any effect on the appeal of the defendants.

[45] In *The Minister For Human Resources v. Thong Chin Yoong & Another Appeal* [2001] 3 CLJ 933; [2001] 4 MLJ 225, at p. 941 (CLJ); p. 232 (MLJ), the Federal Court declined to answer the question framed for its determination when it was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. Haidar Mohd Noor FCJ (as he then was) in delivering the judgment of the Federal Court has this to say:

> It seems to us that the Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent the proper order that we should make would be regrettably decline to answer the question …

[46] Similarly in the present case, this court was asked to answer an issue which was not determined by the High Court and the Court of Appeal. This court in *Tan Heng Chew & Ors v. Tan Kim Hor & Ors* [2006] 3 CLJ 481; [2006]

A 5 MLJ 313 had encountered such an occasion when it granted leave to appeal on one question of law. In the course of arguments, the appellants therein took a completely new stand seeking to argue on a new ground which had never been raised previously in the court below. Abdul Hamid FCJ held that:

> [12] The proposed test had not been argued and considered in the courts
> B below. The findings of facts made by the High Court and confirmed by the Court of Appeal would be rendered superfluous and irrelevant. The respondents now have a new case to meet. Had the proposed test been argued and accepted by the High Court, *we do not know what the learned judge's findings of facts relevant to the test and what his decision would have been … The truth is that both the High Court and the Court had not addressed their*
> C *minds to the issue …*
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> [14] … I am now of the view that this court (in which I was a member) should not have granted leave to appeal. However, leave having been granted, the issue is whether this court should now answer the question, in the circumstances mentioned above. I am of the view that this court
> D should not do so.
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> [15] *I have given serious thought whether, I should nevertheless consider the question and give an answer to it. I think I should not. Otherwise, I would be making assumptions of what the learned High Court and Court of Appeal judges would have decided, on facts and law. …*
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> E [16] Lastly, I would like to clarify that this judgment is not on the ground that the appeal falls outside the provisions of s 96(a) of the Courts of Judicature Act 1964. On the other hand, it is on the ground that the appeal has taken a new turn completely and to answer the question posed (which issue was never canvassed in the courts below) would be a pure academic exercise which requires this court to assume that the facts
> F required to answer the question had been proved, when the courts below had not even addressed their minds to them. Neither should this court assume that they had been proved. (emphasis added)

[47] Premised on the aforesaid, we therefore decline to answer Question 1.

G **[48]** In addition, cloaked under question 1, the defendants argued that the s. 360 CMSA order can be challenged collaterally in committal proceedings, and sought to introduce the following arguments which are outside the scope of this appeal:

(i) That D1 and D3 cannot be said to have *mens rea* to refuse to obey the
H s. 360 CMSA order;

(ii) the plaintiff was not empowered to direct the defendants to restore monies wrongfully paid out in breach of the plaintiff's listing requirements;

I (iii) the High Court was not empowered to make the restoration orders;

(iv) the plaintiff did not have the necessary *locus standi* to initiate proceedings for contempt by reason of the consent judgment between the defendants and Cepatwawasan; and

(v) it is not in the public interest for the plaintiff to seek to enforce the s. 360 CMSA order.

[49] The plaintiff submitted that the above issues were canvassed as questions of law at the application for leave to appeal stage at the Federal Court. The Federal Court had considered and declined to grant leave to those questions of law on 16 October 2017 which encompassed the issues raised as stated in paras. [48] (i) to (v) above. In the written submissions, the plaintiff has reproduced the proposed questions of law which comprised the five issues as stated in paras. [48] (i) to (v) above.

[50] As leave was not granted by this court on those questions and issues, the defendants are not permitted to argue on the same before this court. In this regard r. 47 of the Rules of the Federal Court 1995 is relevant, which is the starting point in determining the scope of this appeal:

> Rule 47. Appeal to be by notice
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> (4) The hearing of the appeal shall be confined to matters, issues or questions in respect of which leave to appeal has been granted.

Raus Sharif CJ in *Spind Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Anor* [2018] 4 CLJ 705 held on a similar issue and ruled that:

> The appeal should be confined only to the questions as determined by this court in granting leave to appeal, and other grounds which are necessary to decide on those questions. As this court has held in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 …
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> …
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> The parties should confine their submissions to the questions of law posed, and are not entitled to seek a complete rehearing to review the concurrent findings of facts made by the courts below …

[51] The submissions put forward by counsel for the defendants in support of those issues raised are in effect seeking for a reversal of the finding on the validity of the s. 360 CMSA order, which is not permitted at this stage. The defendants have exhausted their avenue to challenge the validity of the s. 360 CMSA order until the Federal Court, in which their application for leave to appeal was dismissed. The s. 360 CMSA order was appealed upon and upheld in the High Court and the Court of Appeal. Arguments were mounted on the powers of the plaintiff to grant the s. 360 CMSA order.

[52] The argument to challenge the powers of the plaintiff in directing restitution to be made by the defendants has been superseded by the court granting the s. 360 CMSA order. It is this precise order that was being enforced through the committal proceedings.

[53] The High Court had original jurisdiction in granting the s. 360 CMSA order and this was considered and affirmed by the Court of Appeal speaking through Ramli Ali JCA (as he then was) in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal* [2012] 8 CLJ 678; [2013] 1 MLJ 158. His Lordship found that the plaintiff could move the court under s. 360 of the CMSA for the orders sought and that it was incumbent on the courts to satisfy itself that there was a breach of the relevant listing requirements. The court then concluded that there was a breach of the requirements by the defendants, being directors of Cepatwawasan, given the provisions of s. 360 of the CMSA and the role of the plaintiff when His Lordship said:

> [25] The court has the power to make the various orders as set out in s 360 of the CMSA including for the present purposes, an order requiring a person to do anything he is required to do under a relevant requirement and the giving of directions concerning compliance with or enforcement of the rules of stock exchange.
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> …
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> [34] ... the listing committee of the respondent had correctly founded that Prolific Yield, a wholly subsidiary of Cepatwawasan (a listed issuer) had lent or advance RM16 million to Opti Temasek and one Sheikh Abdul Rahim (who was a driver to the 1st appellant) in contravention of the said para 8.23 (1) of the LR, and by virtue of paras 16.10-16.11 of the LR, all the appellants as directors of Cepatwawasan at the material times were liable for the breach. There is no indication to show that the lending or advancing of the money to these entities falls under any of the permitted acts under para 8.23 (1) of the LR.
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> [35] All the appellants, being directors of Cepatwawasan at the relevant times were responsible of the said breach.
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> …
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> [37] Under para 16.17 of the LR, there are various penalties that can be imposed by the respondent on a listed company and its directors for any breach of the LR. These include issuance of caution letter, issuance of private or public reprimand, a direction to rectify the non-compliance, suspension of trading, delisting, imposition of fine not exceeding RM1 million and any other action which the respondent may deem appropriate.

[54] On the contention of the defendants that the plaintiff's recourse is not within s. 360 of the CMSA and that the CMSA only provides for power of enforcement of penalties only to Securities Commission and not the plaintiff; was also addressed by His Lordship at paras. [52] and [53] and concluded that

the fines imposed were in accordance with the relevant Listing Requirements by the plaintiff as the stock exchange, not by the Securities Commission. If the plaintiff wishes to enforce the penalties, s. 354 of the CMSA is inapplicable. It is s. 360(1)(c) of the CMSA which provides for "an application by an exchange holding company, a stock exchange a futures exchange or an approved clearing house as the case may be, if it appears to the court that any person has contravened a relevant requirement."

[55] On the issue of the consent judgment entered into by the defendants with Cepatwawasan, His Lordship in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal* had also addressed it when His Lordship said that:

> [66] Public interest is best served by the respondent directing the return of the monies paid out in breach of the LR. Notwithstanding the settlement between the parties in the 1168 Suit, public interest and investor's confidence must be protected by ensuing (sic) that the respondent can still take action to rectify the breach by directing the return of the monies wrongly paid. The respondent's action based on a breach of the LR does not overlap with the 1168 Suit's cause of action. Therefore, in continuing to maintain the direction that the monies are to be repaid, the respondent is merely carrying out its statutory duty under the CMSA 2007 and enforcing the principles of the LR.

The application for leave to appeal to the Federal Court on the s. 360 CMSA order by the defendant, was also dismissed.

[56] It is to be borne in mind that the power to order restitution by the plaintiff is provided for under s. 360(1)(c)(ii)(M) of the CMSA. Hence, there is no issue that the court has the authority and jurisdiction to make the s. 360 CMSA order. In any event, it is superfluous to raise the issue whether the plaintiff has the jurisdiction to direct the defendants to restore the monies to Cepatwawasan as the court had issued the s. 360 CMSA order.

[57] In addition, this court is not the proper forum to address this issue as the proper forum to raise the same is at the judicial review proceedings. It has in fact been raised there and it was rejected.

[58] Be that as it may, the plaintiff has relied on para. 16.17(1)(b) of the listing requirements when it directed the defendants to make restitution to Cepatwawasan, which has been paid out in breach of paras. 8.3, 8.23, and 16.10 of the listing requirements. Paragraph 16.7(1)(b)(v) of the plaintiff's Listing Requirements empowered the plaintiff to "issue a letter directing the person in default to rectify the non-compliance, which direction will remain in force until it is revoked."

[59] Hence, to attack the s. 360 CMSA order by raising it in this present appeal, which is an appeal against the committal order, is a collateral attack, which the Federal Court on 16 October 2017 refused to grant leave to the

defendants to pursue this question of whether they can collaterally attack the s. 360 CMSA order. It is trite law that an order of the court cannot be collaterally attacked in a separate proceedings without it being set aside.

(i) *Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal* [2019] 9 CLJ 153; [2020] 1 MLJ 689;

(ii) *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd* [2016] 8 CLJ 163; [2017] 1 MLJ 689.

Question 2

Where Proceedings Are Commenced For Orders Under s. 360 Capital Markets And Services Act 2007 ("CMSA") Against A Bankrupt, Whether The Plaintiff Is Obliged To Obtain Leave Pursuant To s. 8(1), Bankruptcy Act 1967

[60] Question 2 only relates to D1 as he was a bankrupt at the time the committal proceedings was commenced. D2 is not a bankrupt and D3 was only made a bankrupt after the s. 360 order was obtained.

[61] We agree with the submissions by the plaintiff that this question seeks to challenge the validity of the s. 360 CMSA order.

[62] At the time when the filing of the proceedings to obtain the s. 360 order was instituted by the plaintiff, D1 was already a bankrupt. However, at that point in time, D1 failed to disclose the fact that he was a bankrupt and therefore did not seek the necessary sanction and approval to appoint solicitors to represent him in those proceedings. In those proceedings, D1 never at all raised the fact that he was a bankrupt.

[63] The appeal before us is on the determination by the courts below on the orders of committal against the defendants made by the High Court on 1 July 2016 and affirmed by the Court of Appeal on 13 February 2017. It is never to consider whether the s. 360 CMSA order was valid or not.

[64] Hence, it is not for this court to consider the validity of the s. 360 CMSA order (which was dated 28 December 2010) at this stage, when this issue was never addressed at all in the court below. The validity of the s. 360 CMSA order was affirmed by the Court of Appeal on 16 December 2010 and leave to appeal to the Federal Court was dismissed on 28 December 2013. It is not for this court to reverse the decision of the courts below premised on the question posed when the issue raised in the question was never addressed, argued nor canvassed by the parties before the courts below which had not made any determination on the issue in question.

[65] Essentially, the manner in which question 2 is framed also amounts to a collateral attack on the s. 360 CMSA order, which the law does not permit, given that D1 attempted and failed to challenge the s. 360 CMSA order in the High Court and the Court of Appeal. He has exhausted all

avenues of appeal right up to the Federal Court to challenge the validity of the s. 360 CMSA order but failed. Hence, the s. 360 CMSA order, for all intents and purposes, are valid and binding. The Federal Court in *Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal* (*supra*) was instructive in this regard:

> [59] It cannot be opened to any person to decide upon himself whether an order of a court which binds him is wrongly issued and does not require his obedience. Until such time it is set aside or varied the order of court is entitled to the obedience and respect from all parties. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences (see *Wee Chee Keong v. MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217)
>
> [60] It must be borne in mind that, there is a legal presumption that an order of a court is validly made, unless it was obtained by fraud, *etc*. It bears repeating that the 1995 order was made by the High Court with unqualified participation of all relevant parties. The parties were also represented by their respective counsel as disclosed in the 1995 order itself. A court order regularly made cannot be ignored on the belief of a party that is a nullity. Any such attempt would militate against the basic legal position as pronounced in the various earlier cases on the subject, that a regularly made order of court must be observed at all costs.
>
> …
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> [66] It is, therefore, a long established principle of law that one may apply to set aside an order of a superior court but it must be made in a direct and specific proceeding filed for that purpose be it in the same proceedings or a separate one. It cannot be contested merely by raising it as defences in a suit as being undertaken in these appeals. The underlying reason for this legal jurisprudence to be adhered to, is not difficult to appreciate. It is to preserve the sanctity as well as the finality of an order of court …

[66] Given the aforesaid, we decline to answer Question 2.

Question 3

Where Committal Proceedings Are Commenced To Enforce An Order Made Under s. 360 CMSA, Against A Bankrupt Whether The Applicant Is Obliged To Obtain Leave Pursuant To s. 8(1) Bankruptcy Act 1967

[67] Section 8(1) of the BA provides:

> Effect of receiving order
>
> 8(1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, **no creditor** to whom the **debtor is indebted** in respect of any **debt provable in bankruptcy** shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose. (emphasis added)

[68] Section 8(1) of the BA applies to a creditor. The plaintiff in our case is not a creditor where the defendant owes a debt, whether provable in bankruptcy or otherwise.

[69] The s. 360 CMSA order does not create a creditor-debtor relationship.

[70] This section is applicable in situations where the plaintiff imposed a fine on those who breached any of the Listing Requirements. In those situations, the fines are debts to the plaintiff.

[71] However, the s. 360 CMSA order directs the defendants to restore monies to Cepatwawasan upon which the committal proceedings are premised. It does not create a debt between the plaintiff and the defendant.

[72] Section 8(1) of the BA also mentions "debt provable in bankruptcy" which is defined in s. 2 of the BA as 'any debt or liability by this Act made provable in bankruptcy". "Debts provable in bankruptcy" are set out in s. 40 of the BA:

> Proof of Debts
>
> Description of debts provable in bankruptcy
>
> 40(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.
>
> (2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the receiving order for **any debt or liability** contracted by the debtor subsequent to the date of his so having notice.
>
> (3) Save as provided in subsections (1) and (2) **all debts and liabilities** present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy. (emphasis added)

Hence, the issue to be determined is whether the monies mentioned in the s. 360 CMSA order is "a debt provable in bankruptcy" within the meaning of s. 40 of the BA.

[73] The monies as referred to, in the s. 360 CMSA order are not debts nor liabilities as envisaged under s. 40 of the BA.

[74] Hence, s. 8(1) of the BA has no application whatsoever to our present case as there is no debt owing by the defendant to the plaintiff. The prohibition in s. 8(1) of the BA applies to a creditor which the plaintiff is not, nor is s. 360 CMSA order a "debt provable in bankruptcy".

[75] It is to be noted that Questions 2 and 3 are not applicable to D2 who is not a bankrupt and those questions are also not applicable to D3 who was only made a bankrupt after the s. 360 of the CMSA was made. In any event, this issue was never raised in the courts below. Therefore, we decline to answer Question 3.

Conclusion

[76] We held that the three questions of law posed to us do not relate to the matter in respect of which a determination has been made by the High Court and the Court of Appeal. This is apparent from the High Court and the Court of Appeal grounds of judgment and parties' written submissions at the Court of Appeal.

[77] The issues raised in the proposed questions were also not addressed nor argued in the judicial review proceedings nor in the OS 168 proceedings.

[78] Hence, the issues raised in the three questions do not arise from the judgments of the High Court or the Court of Appeal in the committal proceedings.

[79] We take note that leave has been granted by this court in respect of the three questions, however that does not prevent us from declining to answer those questions based on the aforesaid reasons. Similar stances were taken by this court in:

(i) *The Minister of Human Resources v. Thong Chin Yoong & Another Appeal* [2001] 3 CLJ 933; [2001] 4 MLJ 225;

(ii) *Raphael Pura v. Insas Bhd & Ors* [2003] 1 CLJ 61; [2003] 1 MLJ 513.

where, despite leave was granted, that does not prevent the court from declining to answer the questions posed when the issue/matter raised in the question was not an issue/matter that arose or was decided by the High Court and/or the Court of Appeal.

[80] Answering the questions would not have determinative effect on the appeal before this court. In this regard, we reiterate what was said by the Federal Court in *Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2009] 3 CLJ 125; [2010] 5 MLJ 222 which held that:

> [10] Such being the case, we held that the questions posed were not properly framed under s. 96(a) of the Act. Further, they do not relate to a matter in respect of which a determination has been made by the High Court and the Court of Appeal. Neither is there any evidence that the issue of legality of the contract was ever raised in the Court of Appeal. So, it would be a waste of judicial time and indeed not a proper exercise of authority of this court to engage itself in deciding such questions the

A answer to which would not have the effect of reversing the judgment of the Court of Appeal. The court would not indulge in a fruitless exercise. Thus, this court has the power to decline to answer the questions posed despite the fact that leave to appeal had been granted. In the result, we decline to answer the questions and dismissed the appeal without considering the merits.

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[81] Hence, given the circumstances, we decline to answer the three questions posed, despite leave has been granted.

[82] The appeal is hereby dismissed with costs of RM50,000 subject to allocator and the decision of the Court of Appeal is affirmed.

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